associations because petitioner's corporate character and the law of Minnesota require it to return the savings, if any, to its members. Primarily, therefore, petitioner is disqualified upon its corporate character and not on whether or not it may ever make any savings on the allowable discount. In other words, the court holds that the mere legal requirement of petitioner to determine and refund in cash, or allocate to loan capital, any savings on its operations to its retail cooperative member associations which are consumers cooperative retail associations is the equivalent of granting to those associations "directly or indirectly a discount, dividend allowance, rebate, or a price other than that determined in the manner prescribed by this Act."

Briefly summarized, the court below holds that patronage savings are, as a matter of law, by nature the equivalent of the unlawful discounts, dividends, allowances, or rebates prohibited by paragraph 13 of Section 4 II (i) of the Act.

Neither the Division nor the court hold that petitioner engages in any other type of unlawful rebating or unfair competitive practices except those of handling its patronage savings derived from the allowable discount, at the close of its fiscal year, in the manner herein described. The court holds that petitioner's corporate character itself or its actual practice of determining such patronage savings at the close of the fiscal year and the refunding in cash, or allocation thereof to loan capital for a period of years, are unlawful "matters and transactions in or directly affecting interstate commerce in bituminous coal." It, therefore, affirmed the order of the Division.

III.

JURISDICTIONAL STATEMENT.

Section 240, amended, Judicial Code (28 U. S. C. A., 347), invests the Supreme Court with jurisdiction to re-

quire by certiorari that the cause sought to be reviewed shall be certified to it. Furthermore, Section 6 (b) of the Bituminous Coal Act of 1937 provides that the judgment and decree of the court below, affirming, modifying, and enforcing or setting aside, in whole or in part, any order of the Bituminous Coal Division shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U. S. C., Tit. 28, Secs. 346 and 347).

The date of the judgment or decree sought to be reviewed (R. 170) in January 27, 1942. The date of the opinion (R. 141) is also January 27, 1942.

IV.

THE QUESTIONS FOR DECISION.

The proceeding to review the opinion of the court below presents the following questions, namely:

(1) Does petitioner's corporate character alone disqualify it from having registration as a "distributor" of bituminous coal, as a matter of law, based upon the admitted fact that petitioner's corporate character requires that it shall, at the close of the fiscal year, determine and refund in cash, or allocate to loan capital, all patronage savings, if any, to its constituent member associations which are so-called consumers associations as distinguished from its constituent member associations which are so-called "*bona fide* and legitimate cooperative farmers' organizations"?

(2) Does the admitted actual practice of petitioner at the close of each fiscal year in determining and refunding in cash, or allocating to loan capital for a period of years, all patronage savings in favor of its constituent retail member associations which are consumers associations constitute the unlawful granting of rebates or

other allowances in and intimately affecting interstate commerce in bituminous coal which are prohibited by paragraph 12 of Section 4 II (i)?

(3) Are patronage savings of petitioner, which are its only practices under attack, by the inherent nature thereof, the legal equivalent of unlawful rebates or price allowances which are not created or controlled by state laws or by economic or cooperative principles?

(4) When the Congress enacted the Bituminous Coal Act of 1937 did it intend to include all patronage savings of all types of cooperative associations within the letter or spirit of the practices mentioned in paragraph 12 of Section 4 II (i), which practices are declared to be unfair methods of competition?

(5) Are patronage savings within the body of evils Congress intended to cure?

(6) Did the Congress intend that the latter part of paragraph 13 of Section 4 II (i) should constitute an "exemption" of so-called "*bona fide* and legitimate farmers' cooperative organizations," but leaving other types of cooperative associations within the prohibitions of paragraph 12 of Section 4 II (i)?

(7) If the latter part of paragraph 13 of Section 4 II (i) shall be construed as an "exemption" to farmers cooperative associations, may farmers cooperative associations, if they so desire, engage in the conventional type of rebating and making of price allowances, which have from time immemorial "created savage competition in the bituminous coal industry," in addition to handling patronage savings in accordance with state laws under which incorporated at the end of their respective fiscal years?

(8) Are the "practices" of petitioner in determining and refunding in cash, or allocating to loan capital,

all patronage savings, if any, at the close of the fiscal year (constituting the basis of the disqualification), "transactions in or directly affecting interstate commerce in bituminous coal," or, are these "practices" of petitioner which only have been condemned by the Division and the court below too remote from the current flow of bituminous coal and the market price considerations in connection therewith to invest in them the elements of interstate commerce?

(9) May it be held within judicial reasoning that the Congress intended to say that the determining and refunding in cash, or allocating to loan capital, all patronage savings, if any, at the close of the fiscal year, constitutes at that time a "price allowance" on the market price of the coal itself which moved in interstate commerce many months previously? Or, are the patronage savings something legally different from the unlawful rebates and price allowances mentioned in paragraph 12 of Section 4 II (i)?

(10) (a) Is not the order so vicious as to render itself void, inasmuch as it shows on its face an unlawful sanction that petitioner will be permitted thereunder to purchase coal for resale "to others," *i. e.*, its constituent retail member associations, which are consumers associations, providing *only* it will agree not to *"accept or retain any discount, price allowance or commission"?*

(b) Would not petitioner, after commencement of operations under the order, regardless of its disqualification thereunder to receive the allowable discount, be compelled to refund to its retail member associations which are its retail consumers association (*i. e.*, "to others") any patronage savings derived from savings on any amount added to the minimum price of the coal at the time of resale, and thereby commit an unfair competitive practice with the sanction of the Division?

V.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner seeks to have the opinion reviewed on the following grounds:

(1) It is in conflict in principle with the decisions of other circuit courts of appeals on similar matters concerning rebating or unfair trade practices under other federal statutes.

(2) The court below has decided one or more important questions of federal law concerning the legal nature of patronage savings of cooperative associations which have not been, but should be settled by the Supreme Court.

(3) The court below has decided one or more important federal questions concerning interstate commerce and Congressional intent in conflict with applicable decisions of the Supreme Court.

(4) In deciding that patronage savings of cooperative associations are by nature the equivalent of unlawful rebating, frequently prohibited in federal statutes, the court below has decided a question of national importance which has never before been decided by any federal court. It is a question of first impression which the Supreme Court should decide. This principal question is particularly important to cooperative associations throughout the nation, including marketing associations dominated by farmers as well as consumers associations dominated by farmers. It is also important to consumers associations dominated by other occupational groups than farmers, *but including farmers.* This principal question is important to cooperative associations also because of the numerous war orders which are being issued to control prices and to prohibit rebating and other unfair trade practices. It

is suggested that these war orders do not reveal by way of express language whether patronage savings of cooperative associations are included within their prohibitions. The construction of the court below, if applied to war orders, containing prohibitions against rebates and price allowances, threatens with destruction the entire cooperative movement and stops the functioning of state cooperative laws in respect of all commodities, equipment or supplies within the control of such war orders.

(5) The attention of the court is directed to the fact that within the last ten years practically all of the states have enacted so-called "Fair Trade Acts." These Acts contain a formula for setting wholesale and retail prices on consumers goods. It is unlawful to sell at a price below such so-called fair prices. With the single exception of the State of Michigan these state laws do not carry an *explanatory provision* to the effect that they are not to be construed to prevent cooperative associations from refunding patronage savings. Therefore, the question also arises under these state laws whether the refunding of patronage savings by cooperative associations at the end of the fiscal year constitutes a price adjustment which fixes the actual sale price at a point below the originally determined fair trade price. It is very important, therefore, that the Supreme Court should grant certiorari in order that it may give a decision as to the true legal nature of patronage savings of non-profit cooperative associations incorporated under laws of more than thirty states whose business transactions are largely in interstate commerce and subject to price control regulations under various federal laws and under an ever increasing flow of war orders issued by the executive branches of the United States.

(6) Since upon inspection thereof the order on its face shows itself to be so self-conflicting as to constitute a nullity, it is suggested that the action of the court below sanctions such a departure from the accepted and

usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court. Subsection (b) of the order plainly shows that petitioner *will be permitted thereunder* to purchase coal for resale "to others," *i. e.*, to its constituent retail member associations which are consumers associations, providing *only* that it will agree not to *"accept or retain any discounts, price allowance or commission."* Upon such authority, regardless of its inability to receive the discount which "distributors" may receive from "producers," this petitioner, under its corporate character and the law of Minnesota, would be duty bound to refund any patronage savings from savings realized on any amount added to the minimum price at the time of resale to its retail cooperative member associations (*i. e.*, "to others"), which are consumers cooperative associations, and thereby commit an unfair competitive practice (according to the holding of the Division and the court below that "patronage savings" are the same thing as "rebates" or "price allowances") with the sanction of the Division. Petitioner cannot lawfully accept the unlawful sanction of the order. It cannot accept the proposition that its patronage savings derived from one source only (*i. e.*, from the allowable discount) are unlawful but that those derived from another source (*i. e.*, from an amount added to the minimum price at time of resale) are lawful. The Division and the court hold that all patronage savings are unlawful because they are the same thing by nature as "rebates" or "price allowances." Nevertheless, they sanction, inconsistently, that the petitioner will be permitted to refund patronage savings, excepting those derived from the allowable discount, in the usual manner.

If patronage savings derived from savings on the allowable discount are "rebates" or "price allowances" so are patronage savings derived from savings on any amount added to the minimum price at the time of resale by petitioner. Patronage savings cannot be partly lawful

and partly unlawful, *i. e.*, partly pure and partly impure.

Moreover, if petitioner can "rebate" patronage savings derived from a source other than the allowable discount, it logically follows that the profit-taking "distributors," likewise, would be permitted to grant "rebates" or make "price allowances" on profits derived from any amount they may add to the minimum price of the coal at the time of resale.

The logical effect of the inconsistent order and the holding of the court is the destruction or nullification of the order. The Supreme Court should, therefore, exercise its power of supervision in reference to the affirmance of this self-conflicting order by the court below.

Wherefore, Petitioner prays that a writ of certiorari may be issued under the seal of the Supreme Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding said court to certify and send to the Supreme Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 12085, Civil, *Midland Cooperative Wholesale, Petitioner,* v. *Harold L. Ickes, etc., et al., Respondents,* to the end that this cause may be reviewed and determined by the Supreme Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Supreme Court and the order of the Bituminous Coal Division set aside, and for such further relief as to the Supreme Court may seem proper.

Dated March 16, 1942.

DANIEL C. ROGERS,
1500 Iron Street,
North Kansas City, Missouri,
Attorney for Petitioner.